No. 12306

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

C. E. BONNELL, doing business as The Bonnell Construction Company, and ROY T. EARLEY, doing business as the Roy T. Earley Company, Joint Adventurers under the Trade Name of Bonnell Construction Company of Bremerton,

Appellees,

and

C. E. BONNELL, d/b/a The Bonnell Construction Company and ROY T. EARLEY, d/b/a Roy T. Earley Company, etc.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

MOTION TO DISMISS APPEAL AND BRIEF OF C. E. BONNELL AND ROY T. EARLEY

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MOTION TO DISMISS APPEAL

Come now C. E. Bonnell and Roy T. Earley, appellees on the appeal of United States of America herein, and move that the appeal of the United States be dis-

missed for the reason and upon the ground that the portion of the judgment from which an appeal is sought to be taken is not subject to an appeal or a review by this Court. This motion is based upon the records and files herein.

L. L. THOMPSON,
HENDERSON, CARNAHAN & THOMPSON,
Attorneys for Bonnell and Earley.

POINTS AND AUTHORITIES ON MOTION TO DISMISS

The Notice of Appeal given by the Government is not a general appeal from the judgment but an appeal from the action of the Court below in fixing an interest rate of 3% upon the amount of the Government's claim instead of 6% as demanded (R. 44).

The brief of the Government concedes that the question of the rate of interest to be allowed was "concededly within the discretion of the Court" (R. 7). The same concession was also made at the hearing in the Court below because at that hearing the Court inquired whether the contention of the Government was that the rate "should be 6% and no less than that," to which counsel for the Government replied that "it ought to be 6% but my contention is that is within the discretion of the Court" (R. 37).

Nowhere, in the brief, is there any claim made that

the Court below failed to exercise the discretion which the Government conceded the Court possessed. No decision of this or any other Court or any statute is cited which made it mandatory upon the District Court to fix an interest rate of 6%. The facts are not in dispute, since the matter came before the Court upon the Government's Motion for Judgment on the Pleadings. The brief does no more than to disagree with the conclusion reached by the trial Court in a discretionary matter and by it the Government seeks to induce this Court to consider the question de novo and to, in effect, exercise a discretion which was vested in the District Court.

It is familiar law that no appeal lies from the discretionary order of a Court of original jurisdiction in the absence of a showing that such Court acted arbitrarily or capriciously, or perhaps failed to exercise its discretion.

> "It is a general rule that an Appeal, Writ of Error or Exceptions will not lie from or to the action of a Court in the exercise of its purely discretionary powers, unless the right to review is given by statute, or unless there has been an abusive discretion."
>
> 4 Corpus Juris (2d), 207.

Among the cases cited to support this statement is the decision of this Court in *Barceloux vs. Buffum*, 51 Fed. (2d) 82, where this Court dismissed an appeal

taken from an order of the Court below refusing to permit an intervention where the intervenor was not able to show a vested right to intervene.

See also *Steinfer Patents Corporation vs. Meyerson*, 49 Fed. (2d) 765, and cases cited therein.

It is therefore submitted that the Government's appeal should be dismissed.

The following portion of this brief is intended to cover the appeal of Bonnell and Earley from the judgment and also to discuss the question of interest rate, upon the assumption that the foregoing Motion to Dismiss is denied.

QUESTIONS PRESENTED

We accept Statements 1 and 2 of the Government's brief (Brief page 3) as correct statements of the questions presented on the appeal of Bonnell and Earley and therefore make them a part hereof by reference. If the foregoing Motion to Dismiss the Government's appeal is granted, these will be the only questions presented. If, however, the motion is denied, then in lieu of Statement 3 as set forth in the Government's brief, the following is submitted:

3. If interest may be awarded on an unpaid renegotiation liability arising out of a contract entered into prior to the enactment of the Renegotiation Act, then

is there any evidence to show that the District Court abused its discretion in fixing the rate of interest at 3%, instead of 6%, as asked by the Government.

STATEMENTS OF PLEADINGS AND FACTS

We accept the Statement of Pleadings and Facts set forth in the Government's brief, except (1) we reserve the right to amplify the statement in connection with our argument, and (2) we think there should be added thereto this additional statement.

The Government's brief (page 7) sets forth a correct statement of the judgment entered and makes reference to the fact that the net balance conceded under the pleadings was further reduced "by a tax refund of $307.73 in addition to its reduction from recomputation of interest at 3% with consequent increased application of credit amounts to principal theretofore applied to interest at 6%." Subsequent portions of the brief assert error on the part of the Court below in that it is contended that this additional credit, which is not controverted, should have been applied first to the reduction of interest and not to principal (Brief page 35). The oral decision of the Court made no reference to this item but merely ordered the interest rate to be applied to be reduced from 6% to 3% and a credit allowed and ordered the attorney for the Government to prepare a judgment accordingly (Tr. page 38). The

judgment was prepared by counsel for the Government and the computations were made by counsel for the Government and if there was error in the application of this item it was the error of Government's counsel and not that of the Court (Tr. p. 43).

STATEMENT OF POINTS

1. That the District Court erred in denying appellants Motion to Dismiss the action and in holding that the Renegotiation Act, insofar as it sought to subject to renegotiation the profits of prime contracts entered into with the Government prior to the taking effect of the Act, was in violation of the Constitution of the United States, particularly the Fifth Amendment thereto.

2. That the District Court erred in denying appellants Motion to Strike from the complaint all reference to interest and holding that any interest could be charged against the appellants.

3. Generally that the District Court erred in entering any judgment against the appellants, either in the principal sum or for interest.

ARGUMENT

THE RENEGOTIATION ACT VIOLATES THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES INSOFAR AS IT

SEEKS TO SUBJECT TO RENEGOTIATION THE PROCEEDS ARISING OUT OF A PRIME CONTRACT MADE WITH THE GOVERNMENT PRIOR TO THE TAKING EFFECT OF THE ACT.

It is submitted that this question is controlled by the decisions of the Supreme Court of the United States in the case of *Lynch vs. United States*, 292 U. S. 571, and *Perry vs. United States*, 294 U. S. 330.

The Lynch case involved certain provisions of the economy act of March 20, 1933, which, in effect, for the purpose of affecting economy in Government took away from the holders of Veterans War Risk Insurance, issued after the first war, certain rights and privileges given by the policies of insurance. The Court denied the power in the following language:

> "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. * * * When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals. That the contracts of war risk insurance were valid when made is not questioned. As Congress had the power to authorize the Bureau of War Risk Insurance to issue them, the due process clause prohibits the United States from annulling them, unless, indeed, the action taken falls within

the federal police power or some other paramount power.

"The Solicitor General does not suggest, either in brief or argument, that there were supervening conditions which authorized Congress to abrogate these contracts in the exercise of the police or any other power. The title of the Act of March 20, 1933, repels any such suggestion. Although popularly known as the Economy Act, it is entitled an 'Act to maintain the credit of the United States.' Punctilious fulfillment of contractural obligations is essential to the maintenance of the credit of public as well as private debtors. No doubt there was in March, 1933, great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. *But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States.* To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation. 'The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen.' Sinking Fund Cases, 99 U. S. 700, 719, 25 L. ed. 496, 501." (Italics ours.)

This question was re-examined by the Court in the so-called Gold cases decided in 1935. In 1935 Congress, at the suggestion of the administration, declared the existence of an emergency and further declared that any obligation which purported to give to the obligee

the right to require payment in gold or any particular kind of coin or currency obstructed the power of Congress to regulate the value of the money. The resolution then provided that any such obligation was declared to be against public policy and that every such obligation regardless of its contents should be discharged upon payment, dollar for dollar, in any coin or currency which was declared then to be legal tender. The resolution further declared that the term "obligation" meant every obligation of the United States except currency. The Court will find a full copy of this resolution set forth in *Norman vs. B & O Railroad Company*, 294 U. S. 240, 79 Law Ed. 893. The Court will remember that thereafter money was devalued under a general statute which permitted the President, by proclamation, to devalue the currency by changing the weight of the gold dollar, with a limitation that such devaluation should not be more than fifty per cent. By executive order then all gold was reclaimed by the Government and the possession of gold, except for certain purposes, was declared to be unlawful, and on January 31, 1934, the President fixed the weight of the gold dollar at a certain amount.

The legality of this resolution was challenged in two cases. The first case was *Norman vs. B & O Railroad*, supra. This involved certain railroad bonds issued before the passage of the resolution which provided that

principal and interest should be paid in gold coin equal to the standard of weight and fineness then existing. The Court held that as to transactions between private persons the resolution was valid. It is unnecessary to review the decision in detail. The Court simply held that when contracts were entered into between private individuals that these contracts were subject to the exercise of the police power by the Congress, or as stated by the Court "parties cannot remove their transactions from the range of dominant constitutional power by making contracts about them."

Perry vs. United States, 294 U. S. 330; 79 Law Ed. 913, was a case of a different character, however. In that case the plaintiff was the holder of a liberty bond which provided that "the principal and interest hereof are payable in United States Gold Coin of the present standard of value." The standard of value of course was much more than that fixed by the President under the joint resolution. The bondholder demanded currency in an amount exceeding the face of the bond in the same ratio as that borne by the number of grains in the former gold dollar to the number in the existing one. He was refused payment of more than the face of the bond in currency by the Treasurer. He then brought an action in the Court of Claims. The Court of Claims certified certain questions to the Supreme Court. The Court held (1) that the attempted repudia-

tion by the Government of the gold clause in the bond was an unconstitutional exercise of Congressional authority by the Congress and therefore invalid, and (2) that, however, all the plaintiff could recover would be his damage, and that since he was not able to show damage, he could not recover anything. We are not here concerned with the second point made because here the Government asks for a judgment. We are, however, very much concerned with the first point. The following extracts from the opinion are interesting:

On page 350 it was said:

> "The Government's contention thus raises a question of far greater importance than the particular claim of the plaintiff. On that reasoning, if the terms of the Government's bond as to the standard of payment can be repudiated, it inevitably follows that the obligation as to the amount to be paid may also be repudiated. The contention necessarily imports that the Congress can disregard the obligations of the Government at its discretion and that, when the Government borrows money, the credit of the United States is an illusory pledge.
>
> "We do not so read the Constitution. There is a clear distinction between the power of the Congress to control or interdict the contracts of private parties when they interfere with the exercise of its constitutional authority, and the power of the Congress to alter or repudiate the substance of its own engagements when it has borrowed money under the authority which the Constitution confers. In authorizing the Congress to borrow money, the Constitution empowers the Congress to fix the amount to be borrowed and the terms of payment. By virtue of the power to borrow money '*on the*

credit of the United States' the Congress is authorized to pledge that credit as an assurance of payment as stipulated,—as the highest assurance the Government can give, its plighted faith. To say that the Congress may withdraw or ignore that pledge, is to assume that the Constitution contemplates a vain promise, a pledge having no other sanction than the pleasure and convenience of the pledgor. This Court has given no sanction to such a conception of the obligations of our Government." (Italics are the Court's.)

And again on page 353 the Court said:

"The powers conferred upon the Congress are harmonious. The Constitution gives to the Congress the power to borrow money on the credit of the United States, an unqualified power, a power vital to the Government—upon which in an extremity its very life may depend. The binding quality of the promise of the United States is of the essence of the credit which is so pledged. Having this power to authorize the issue of definite obligations for the payment of money borrowed, the Congress has not been vested with authority to alter or destroy those obligations. The fact that the United States may not be sued without its consent is a matter of procedure which does not affect the legal and binding character of its contracts. While the Congress is under no duty to provide remedies through the courts, the contractual obligation still exists and, despite infirmities of procedure, remains binding upon the conscience of the sovereign. *Lynch vs. United States*, supra. pp. 580, 582."

These cases then squarely hold that when the Government enters into a contract with a citizen, that Congress then has no power thereafter to repudiate that contract, either in whole or in part.

Reference to these two cases made in the Government's brief is upon page 15, where it is asserted that the Lynch case is distinguishable because it is said that case involved taking property without making just compensation, and the Perry case is distinguishable because it did not involve any war powers.

Insofar as the Lynch case is concerned, we submit that the distinction sought to be made is a distinction without a difference. The case does hold that where a valid contract is entered into with the Government that constitutes a vested property right which cannot thereafter be taken away without just compensation under the provisions of the Fifth Amendment. So here, when the Government entered into this contract with Bonnell to build certain barracks for the War Department (R. 3) for an agreed compensation, then likewise the Government had no right to thereafter seek to deprive Earley and Bonnell of a portion of the consideration which it had promised to pay Bonnell when the contract was entered into, and which it afterwards did pay.

Cases are cited, including *Spaulding vs. Douglas Aircraft Company*, 154 Fed. (2d) 419, to the effect that a statute may be retroactive in its features and an analogy is sought to be drawn between retroactive taxation and the question here involved. Insofar as the renegotiation of contracts entered into between private individuals is concerned, it may be admitted that

the right has been established. Whatever may be the logical difference between such a contract and a prime contract with the Government, the fact remains that the Supreme Court of the United States in the Lynch and Perry cases has distinctly denied the power of the Congress to repudiate the contractual commitments of the Government. These decisions are binding upon this Court unless and until they are overruled by the United States Supreme Court.

The suggestion that the cases may be differentiated because this act was in exercise of the war power is not supported by the citation of any authority and we have found none. It is true that in certain instances it has been held that there may be a temporary abrogation of certain rights, such as a declaration of martial law and the temporary suspension of Writs of Habeas Corpus, or the temporary control of rents. We have not found, however, any decision which holds that the provisions of the Fifth Amendment become ineffective upon the happening of a war.

The oldest and most widely cited case is the famous case of *Ex parte Milligan*, 4 Wall (2), 18 Law Ed. 281, where the supremacy of the Constitution was sustained against the claim of military authorities of the right to try a civilian by court martial in time of war. We quote from the case:

"The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proven by the result of the great effort to throw off its authority."

Hamilton vs. Kentucky Distilleries & W. Co., 251 U. S. 146; 64 Law Ed. 194, was a case in which the Court sustained an Act of Congress which prohibited, until the declaration of peace in the first war, the sale of intoxicating liquors to the military personnel or the removal of bonded liquor for sale, except for export. The Act was sustained upon the theory that "there was no appropriation of the liquor for public purposes" and it was pointed out that the law gave a period of time in which it could be disposed of. The opinion which was written by the late Justice Brandeis, a famous Judge who had a most liberal view of the Constitution, however, stated that "*the war power of the United States*, like its other powers, and like the police power of the states, is *subject to applicable constitutional limitations.*"

In *Ludecke vs. Watkins*, 335 U. S. 160; 92 Law Ed. 1881, the Court held that the Constitution was not offended by statute which permitted, without a previous hearing, the removal of an alien enemy. Judge Douglas dissented from the basic conclusion but the following statement made in the dissenting opinion is not contradicted by the majority opinion:

> "It is well established that the war power does not remove Constitutional limitations safeguarding essential liberties."

In *Woods vs. Miller*, 333 U. S. 138; 92 Law Ed. 596, the Court sustained the continuance of the National Rent Control law after the cessation of hostilities but very carefully points out in rather general language that no property was taken without just compensation. Even the majority opinion, however, citing *Hamilton vs. Kentucky Distilleries & W. Co.* supra, states that "the question whether the war power has been properly employed in cases such as this is open to judicial inquiry." The concurring opinion of Mr. Justice Frankfurter states that he concurred "in this opinion because it decides no more than was decided in *Hamilton vs. Kentucky Distilleries & W. Co.*"

Mr. Justice Jackson, concurring, said in part:

> "I agree with the result in the case, but the arguments that have been addressed to us lead me to utter more explicit misgivings about war powers

than the Court has done. The Government asserts no constitutional basis for this legislation other than this vague, undefined and undefinable 'war power.'

"No one will question that this power is the most dangerous one to free government in the whole catalogue of powers. It is executed in a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by the Judges under the influence of the same passions and pressures. Always, as in this case, the Government urges hasty decision to forestall some emergency or serve some purpose and pleads that paralysis will result if its claims to power are denied or their confirmation delayed."

In *Bowles vs. Willingham*, 321 U. S. 503; 88 Law Ed. 892, the Court sustained the original Rent Control Law as doing nothing more than regulating rental transactions in order to take care of a war emergency and thus within the war power. This case, however, clearly recognizes that even war does not justify the taking of property without just compensation because it was there said:

"We fully recognize, as did the Court in *Home Bldg. & Loan Assoc. vs. Blaisdell*, 290 U. S. 398-426; 78 Law Ed. 413-422; 54 S Ct. 231; 99 ALR 1481, that 'even the war power does not remove constitutional limitations safeguarding essential liberties.' "

In apparent recognition of the fact that the distinction sought to be drawn between this case and the Lynch and Perry cases are not logical, it is claimed that

the Supreme Court of the United States in *Lichter vs. United States*, 334 U. S. 742, *and Lincoln Electric Company vs. Forrestal*, 334 U. S. 841, has decided the question.

We submit that upon the contrary the question now presented was expressly reserved by the Supreme Court in those cases. The Lichter case involved three consolidated appeals from decisions of the Fifth, Sixth and Ninth Circuits in cases involving the renegotiation of profits which had been received on Government contracts. As is pointed out on page 788 of the decision, all of the contracts involved were made after the passage of the Renegotiation Act, except four in the Lichter case, but those four contracts were contracts between private contractors and subcontractors and were not contracts with the United States. Substantially all of the opinion is devoted to a discussion of the question of whether the act unlawfully delegated legislative powers to the administrative branch of the Government, and whether an amendment made to the act providing for a review by the Tax Court lacked in due process.

It was not contended, and indeed it could not have been, that it was not within the general power of the Congress to provide that all contracts thereafter made with the Government should be subject to renegotiation. Such a provision of statute would of course be regarded

as incorporated in the contract by reference, even if not expressly placed therein. As to subcontractors, clearly under the decision in *Norman vs. B & O Railroad*, supra, the act was effective, since as to those contracts the pledge of the Government had not been given. This, as we have shown, was the only type of contract entered into previous to the passage of the act involved in the case. The decision makes no reference whatsoever to either the Perry or the Lynch cases and, as we read it, very carefully avoids passing upon this question. Since the portion of the opinion which has to do with this is short, we reproduce it in full:

> "The excessive profits claimed by the Government in these cases arose out of contracts between the respective petitioners and other private parties. *None arose out of contracts made directly with the Government itself.* All the contracts, however, related to subject matter within the meaning of the Renegotiation Act in its respective states. The contracts all were of the type which came to be known, under the Act, as subcontracts. All, except four in the Lichter case, were entered into after the enactment of the Original Renegotiation Act, April 28, 1942, and on those four, the final payment had not been made by that date. *We therefore do not have before us an issue as to the recovery of excessive profits on any contract made directly with the Government* nor on any subcontract upon which final payment had been made before April 28, 1942, although relating to war goods made or services performed after the declaration of War, December 7, 1941. Congress limited the Renegotiation Act to future contracts and to contracts already existing but upon which final payments had not been made

at the time of the passage of the original act. These included contracts made directly with the Government and also subcontracts such as those here involved.

"We uphold the right of the Government to recover excessive profits *on each of the contracts before us.* This right exists as to such excessive profits whether they arose from contracts made before or after the passage of the Act. A contract is equally a war contract in either event and, if uncompleted to the extent that the final payment has not yet been made, the recovery of excessive profits derived from it may be authorized as has been done here." (Italics ours.)

We call the particular attention of the Court to the fact that the opinion specifically points out that none of the contracts involved in the case which were entered into previous to the passage of the Act, were made directly with the Government. Of particular significance is the statement of the Court that "we uphold the right of the Government to recover excessive profits on each *of the contracts before us.*" The contracts before the Court were not contracts with the Government. If the Court had intended to overrule or distinguish the Lynch and Perry cases, then certainly they would have been referred to.

The suggestion upon page 12 of the Government's brief that *Lincoln Electric Company vs. Forrestal* in some way decided the point expressly reserved in the Lichter case is not supported by the reported deci-

sion of that case. The decision is a *per curiam* decision which affirms the judgment of the Court below on the authority of the Lichter case. It seems rather obvious, that in view of the careful reservation of the question in the Lichter case, that it should not be presumed that the Supreme Court intended in this *per curiam* opinion to decide the very question which it had previously reserved. A reference to the opinion of the Court below in the Lincoln Electric Company case, 77 Fed. Sup. 441, shows that this was a proceeding for a declaratory judgment. There is nothing in the opinion to show that there was involved in the case any prime contract entered into before the taking effect of the Act. Certainly the stated fact that the period involved was the year 1942 does not justify the assertion that the case is applicable, because the Act became effective on April 28, 1942, and any contracts entered into thereafter even if directly with the government would, under the Lichter case, be subject to renegotiation. We can find nowhere in the decision of the lower Court any statement of fact or any statement of contentions made which show that the point which we are now presenting was either involved or decided.

NO INTEREST SHOULD HAVE BEEN ALLOWED

As is conceded in the brief of the Government, there is no provision providing for the imposition of

interest either in the Renegotiation Act or in any general statute. It may be conceded that the various District and Circuit Courts including this Court have held in *cases involving contracts entered into after the passage of the Act*, that the refusal of a contractor to pay an amount legally determined to be due the Government permits the imposition of interest until the amount is paid. The decision of this court in the case of *Sampson Motors, Inc. vs. United States*, 168 Fed. (2nd) 871, so holds. This decision is based upon the case of *United States vs. Strontium Products Co.*, 68 Fed. Supp. 886, from which a long quotation is set forth. That case involved the renegotiation of a contract made after the taking effect of the Act and it was held that although the act made no express provision for the payment of interest, that in view of the fact that the Act was in existence at the time the contract was made that the provision for renegotiation must be considered to be by implication a part of the contract. We quote from the decision:

> "In view of the above, I conclude that all war contracts made by defendants with plaintiff during 1943 must be considered as containing the agreement for elimination of excess profits by renegotiation, and therefore that defendants' liability is based upon express contract."

Here it cannot be contended that Bonnell's agreement with the Government should be considered as

containing by implication an agreement to renegotiate, because when the agreement was made there was no such statute. The Strontium case, supra, which is the basis of this Court's decision in the Sampson case, says that "this is not a suit between private individuals but one brought by the Government seeking to recover a *debt, ex contractu,* from private persons. The allowance of interest in such a situation does not require an express statutory authority." This quotation is set forth in the decision of this Court. Certainly in the case at bar the right to renegotiate cannot be sustained upon the theory that there was a contract, either express or implied, to pay negotiated excess profits. No authorities are cited in the brief to sustain the proposition that a Government claim not based on contract but on the exercise of the police power permits the imposition of interest.

THERE IS NO EVIDENCE TO SHOW THAT THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT FIXED THE INTEREST RATE AT 3%.

As we have shown, this was in the discretion of the District Court, since there was no statute which either commanded the imposition of interest or fixed the rate. No evidence was taken on the question since the judgment entered was the result of the granting by the Court of the Government's Motion for Judg-

ment on the Pleadings. The motion therefore conceded the truth of the allegations of the defendants partial defense which was addressed only to the question of the interest rate (R. 25 to 30). An examination of the Answer therefore becomes necessary. Paragraph 1 of the Answer alleges that the contract here involved was for the construction of certain barracks shortly after the beginning of the last war; that the contract required completion of the work within sixty days "and involved much hazard and risk of loss arising out of the then uncertainty with respect to securing lumber and adequate labor." It is further alleged that Earley had been for many years engaged in the contracting business and that in 1942 he took war contracts in a substantial sum. It was further alleged that he was renegotiated by the Government for this other business "and it was found and determined that he made no excessive profits and he was not required to repay to the Government any sum whatsoever upon said contracts." It was also alleged that during this time "it was almost the universal practice of the Government to renegotiate these contracts on an annual basis."

Paragraph 2 alleges that during this time the ordinary commercial rate of interest in the area ranged from 3½% to 4½% even if on open and unsecured loans, and that during the same period the Government paid interest ranging from 1% on short term loans to a maximum of 2.9% on treasury bonds.

Paragraph 3 contains a long recital of the transactions between the defendants and the Government which it is important to consider. It recites that on June 20, 1946, defendants' attorneys received a letter from the Assistant District Attorney advising that he had been instructed by the Attorney General of the United States "to undertake settlement of the above matter" (R. 27). We think it cannot be denied that previous to that time the defendants had refused to make any payment based upon the Constitutional objection heretofore made. The paragraph further recites that there was some discussion between these attorneys and the Asst. District Attorney which culminated in the submission by defendants' counsel to the District Attorney's office of an offer of compromise and settlement. This offer was forwarded by the District Attorney to the Attorney General of the United States and thereafter the District Attorney was advised by the office of the Attorney General that "it is suggested that you have the contractors' attorneys make a similar written offer of compromise settlement addressed to the Attorney General." (R. 27). The paragraph further alleges that pursuant to this suggestion the defendants on December 20, 1946, submitted to the Attorney General an offer of compromise and settlement and that on January 13, 1947, an Asst. Attorney General sent to defendants' attorneys a letter which is

copied in full (R. 28). This letter acknowledges receipt of the compromise offer and states that the practice in such matters is to, among other things, get the views of the United States Attorney handling the case and then concludes "we are now awaiting the views of the United States Attorney at Seattle, Washington. As soon as we hear from him you will be advised of the Department's final position in the matter." The Answer further states that at that time several cases were pending in the Federal Courts involving the validity of the Act and the allegation was made on information and belief "that no action was taken on defendants offer of compromise pending the determination of certain cases then pending in the Federal Courts." It was further alleged that Mr. Sonnett, the author of the letter of January 13th, never did advise defendants' counsel "of the Department's final position in the matter," but that on June 1, 1948, which was almost two years after the original letter from the Attorney General's office directing the District Attorney to make a settlement, the defendants were advised that the compromise proposal made under date of December 20, 1946, had been finally rejected.

From this review of the Answer, the truth of which is admitted, it is submitted that there appears at least three reasons which justify the refusal of the District Court to allow the maximum rate demanded.

The first reason arises out of a rather unusual situation with respect to Earley. The original Renegotiation Act allowed the Government to renegotiate either upon an annual basis, that is to say, upon the basis of the entire profits made by the contractor in a year, or to renegotiate individual contracts without regard to the profits, if any, obtained by the same contractor from other war contracts during the same year. Insofar as this contract was concerned Earley received 50% of the profits in 1942 and the joint adventure then came to an end. The Motion for Judgment, however, admits our allegation that during the same year Earley received substantial sums from other Government contracts and that he was renegotiated and nothing further was found due to the Government therefrom. Had his 50% share of this particular venture been included in this annual renegotiation, it is doubtful whether anything would have been found due from him. Certainly it would not have been the amount here sought to be recovered and certainly this fact placed him in a different position than contractors who had been renegotiated for their entire annual profits and ordered to return a portion as excessive. Although this is outside the record, we might state that in the offer to compromise we waived the Constitutional objection and offered to pay one-half of the renegotiated sum, being the one-half Bonnell would have had to pay. The injus-

tice of a renegotiation conducted as this one was is obvious even though there might have been no legal defense to it. It permitted the Government to renegotiate and recapture profits received on a single contract by a contractor who had other contracts with the Government upon which he might have lost money, or at least made no other profits. Indeed this was the exact situation here insofar as Earley was concerned. The possibility of this injustice was recognized by Congress and the Act was amended in the fall of 1942 by a provision which required renegotiation to be conducted on an annual basis, unless the contractor consented to a different procedure. (Act of Oct. 21, 1942, 50 U.S.C.A. War Appendix Sec. 1191 (c) (1).)

This case is unique in that it is the only adjudicated case which we have been able to find where the renegotiation was not made on an annual basis. Earley was unfortunate in that he entered into this transaction prior to the October amendment. While it is true, assuming the Act to be valid, that he had no legal defense to the Government's election to treat him unfairly by refusing to include in the overall renegotiation his one-half of the profits from this deal, it would still seem that the District Court had the right to consider this in connection with the exercise of his discretion when he fixed the interest rate.

The second reason in support of the District Court's conclusion is the conceded fact that at that time the interest on commercial loans ranged from 3½% to 4½% although not secured, and that the rate paid by the Government on Government bonds ranged from 1% to 2.9%. Having in mind the circumstances which we have related, was it just and equitable for a Government which paid as little as 1% for loans made to it to demand 6% in this instance.

The third reason arises out of the negotiations, which occupied some two years, between defendants' counsel and the office of the Attorney General of the United States. Instead of filing an action in June, 1946, to enforce its claim, the Government itself proposed that an offer of compromise be made and then when the offer was made it was permitted to remain upon the desk of some person in the Attorney General's office for a period of about seventeen months despite the promise made by the Asst. Attorney General that as soon as the views of the District Attorney had been secured defendants "would be advised of the Department's final position in the matter." It is conceded that the reason for this was that the office of the Attorney General was awaiting the decision of some other cases then pending in the Federal Courts. (R. 29.) The defendants of course were powerless to do anything since the Government was the prospective plaintiff in

the action, but had started no action. Doubtless it was felt that if the matter was then pressed it was possible that an adverse decision might be made by the Court below which would perhaps affect other renegotiations from the standpoint of the Government. We do not here contest the right of the Asst. Attorney General, for reasons deemed sufficient by him, to postpone action on this claim, nor, we suppose, was he legally obligated to carry out the promise made in the January letter, whatever one may think of his seeming lack of courtesy. Be that as it may, however, this delay of two years in the final prosecution of this claim was not made at our request and occurred on account of the action of the Government. It seems clear, therefore, that this was a circumstance which justified the District Court in exercising his discretion in the manner in which he did, because had the Government proceeded with reasonable diligence two years' interest would have been eliminated.

The District Court expressly considered the last two reasons which we have suggested, but made no reference to the first one (R. 37-38). It is also significant that at the hearing the trial Court observed that with respect to the delay "the Government agrees it is at least as culpable as the defendant in this case" (R. 38). To this statement the only rejoinder made by Government counsel was that the Government "never dis-

couraged the defendant from making further offers." We also direct attention to the Court's ultimate finding on this contained on page 38 in which he says "I shall find that the interest in this particular case, *under the facts as admitted by the oral arguments and by the pleadings*, should be at the rate of 3% instead of 6%." The oral arguments are not contained in the record but it does appear from the Court's decision that the Government admitted that the delay in the prosecution of the case was caused by its own action.

Can it be said that the District Court abused its discretion when it refused to fix a maximum rate of interest in view of all these circumstances? We submit not.

It is suggested that there was nothing to prevent the payment of the claim during the period of this delay. In answer to this we suggest that certainly the defendants were justified in withholding payment in view of the invitation of the Government to submit a compromise offer with the promise of the Government that the matter would be soon determined.

On pages 33 and 34 attention is called to two or three decisions of the lower Federal Courts where a rate of 6% was allowed. No facts or circumstances appear in any of these cases of the nature here involved. Each of them involve the flat refusal of the

contractor to pay based upon Constitutional grounds, or perhaps in some instances upon questions of fact, where no appeal had been taken to the Tax Court. In two cases, however, Federal District Courts have fixed a lower rate than 6%. In *U. S. vs. Clark*, 72 Fed. Supp. 393, Judge McColloch of the Oregon District Court fixed an interest rate of 2½% on a renegotiation judgment. Apparently in that case there were no extenuating factors as here. The judgment in the case was for some $42,000.00. Some curiosity might be expressed as to why no appeal was taken from that judgment by the Attorney General.

In *United States vs. United Drill & Tool Corporation*, 81 Fed. Supp. 171, the question was passed on by District Judge Holtzoff of the United States District Court of the District of Columbia, which was after the decision of this Court in the Sampson case. The Court there concluded that since the Court of Claims in *Arkansas Valley Railroad vs. United States*, 68 Fed. Supp. 727, had sustained the position of the Government that, in the absence of statute, 4% was the proper rate to be applied in a judgment against the United States, that the same rate would be there allowed. In that case also there appear to have been no extenuating circumstances. It might also be noted that the Court concludes, following the reasoning of the Court of Claims, "that an approach to the market rate of inter-

est was the proper measure of damage rather than using the analogy of statutory interest." We also call attention to the statement in that case to the effect that "the purpose of interest is to award damages for delay in the payment of money, unless interest is expressly provided by contract or statute." If such be the purpose here, then certainly we should not be charged with the two years' delay for which the Government was responsible.

This case was decided November 23, 1948, and the citator does not reveal that the Government attempted to appeal to a higher Court. Curiosity is again expressed as to why an appeal was not taken from that case. It may be that the justified criticism by the Court below of the lack of diligence on the part of the office of the Attorney General caused that office to prosecute this appeal rather than the importance of the question or amount of money involved.

Pages 35 and 36 lend some credence to this thought, since complaint is made here that the sum of $307.73 required to be credited on the amount of the Government's claim was credited to principal rather than interest to the detriment of the Government. The brief does not compute the detriment, if any, which the Government would sustain. Conceding that it is right, for the purpose of the argument, it could not possibly

amount to more than a few dollars. The matter is certainly not of sufficient importance to call for the consideration of an appellate Court. But in any event, as we have previously pointed out, the judgment was prepared by counsel for the Government and the Court made no direction whatsoever concerning the manner of applying the additional credit. If there was error, it was invited error for which the Government was responsible and it is therefore now estopped from questioning the item.

Respectfully submitted,

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